United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2067

IN THE UNITED STATES CIRCUIT COURT OF

APPEALS FOR THE SECOND CIRCUIT

JEROME J. WELLS,
EDWARD A. SWEETSER,
FRANCES M. BARBEAU,
WALTER HOLMES, CONRAD
MOORE, DAVID N.
O'CONNELL, LAURA MAY
NOYES, RONALD MILES
MAGONI, SHIRLEY A.
MARSH, ROBERT LEE BOOTH
RAYMOND CHESTER LUCAS, JR.,
Appellants

B

v.

JAMES E. MALLOY,
Commissioner of Motor
Vehicles of the State
of Vermont,
Appellee

On Appeal from the United States District Court

for the District of Vermont

BRIEF OF APPELLEE

Richard M. Finn
Assistant Attorney General
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602

2

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTORY AUTHORITIES

STATEMENT OF THE CASE

The Appellee concurs with the Statement of the Case as stated by the Appellant in his Brief.

ARGUMENT I

28 U.S.C.A., SECTION 1341 BARS AN INJUNCTION REQUIRING THE REINSTATEMENT OF MOTOR VEHICLE OPERATORS LICENSES WHEN SAID LICENSES HAVE BEEN SUSPENDED FOR FAILURE TO PAY A STATE PURCHASE AND USE TAX.

The controlling Statute governing the disposition of this appeal is 28 U.S.C.A., Section 1341 which provides as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

There are two leading cases in this jurisdiction which have considered the issues raised in the Appellant's Complaint. They are American Commuter's Association, Inc. et al v. Arthur Levitt et al, 405 F.2d, 1148 (1969) and the more recent case of Hickmann v. Wujick, 335 F.Supp. 1221, 488 F.2d, 895 (1973).

The American Commuter's case, supra, involved a suit by individuals who are non-residents of the State of New York seeking an injunction against the enforcement of certain New York State and city income tax laws against non-residents or in the alternative, a declaration of unconstitutionality of certain State taxing statutes. In that case the Plaintiffs further contended that such laws were unconstitutional and violated the equal protection clause of Section 1 of the 14th Amendment.

The Court held that a state court should first determine the meaning and scope of a tax statute passed by its Legislature and Federal review of the constitutionality of such statute should be held only after an adjudication by the State's Court of last resort. In affirming the District Court's refusal to convene a three-judge court, the Court cited with approval the language contained in Matthews v. Rogers, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932) which states in part as follows:

> "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the complaint may be brought to this Court for review if any federal question be involved."

The Hickmann case, supra, was a suit brought on behalf of parents whose children attended a non-public school and claimed a deprivation of their rights as parents to control the education of their children, and they sought by way of a declaratory judgment, an injunction to restrain the town assessor from denying a tax credit against school property taxes which the parents were required to pay. The Court affirmed the doctrine expressed in the American Commuter's Association case, supra, and held that where there are adequate state remedies available to test the constitutionality of a tax statute, federal courts are without jurisdiction to entertain the claim.

ARGUMENT II

A PLAIN, SPEEDY AND EFFICIENT REMEDY EXISTS IN THE COURTS OF THE STATE OF VERMONT, THUS DEPRIVING THE FEDERAL COURTS OF JURISDICTION IN THIS CASE.

In considering the nature of the remedies available in state courts, it was held in Bland v. McHan, 463 F.2d 21 (1972), that it is not required that the state remedy be the best remedy available or equal to or better than the remedy which might be available in Federal courts, but only that it be a plain, speedy and efficient remedy.

In considering whether or not under state law a plain, speedy and efficient remedy is available to the Appellants, a review of several procedures under which a determination regarding the constitutionality of the Purchase and Use Tax can be determined is essential.

Rule 57 of the Vermont Rules of Civil Procedure relating to Declaratory Judgments provides:

> "The procedure for obtaining a declaratory judgment pursuant to 12 V.S.A. §§4711-4725 shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the matter provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Pursuant to Rule 62, V.R.C.P., relating to Stay of Proceedings to Enforce a Judgment, under the provisions of Section (d) even if the Appellants did not prevail in the county court on their claim relating to the Purchase and Use Tax, the Court may suspend, modify, restore or grant an injunction during the pendency of an appeal to a higher court.

Rule 65, V.R.C.P., relating to Injunctions, provides as follows:

> "(a) Temporary Restraining Order; Notice, Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that he believes this information to be true...In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order..."

Under Rule 65, V.R.C.P., a Temporary Restraining Order is available to the Plaintiffs, as well as the numerous Intervenors, which accords them the same rights and remedies available through the Federal Rules of Civil Procedure.

In the case of Graves v. Town of Waitsfield, 130 Vt. 292, 292 A.2d 247 (1972) the Vermont Supreme Court held that injunctive relief can be granted in a declaratory judgment action.

ARGUMENT III

WHERE A PLAIN, SPEEDY AND EFFICIENT REMEDY EXISTS IN THE STATE COURTS THERE ARE NO EXCEPTIONS TO THE RULE THAT FEDERAL COURTS MAY NOT ENJOIN, SUSPEND OR RESTRAIN THE ASSESSMENT LEVY OR COLLECTION OF A STATE TAX.

The Appellant in his Brief places great reliance on the case of Mitchum v. Foster, 407 U.S. 225 (1972) which held that 42 U.S.C., Section 1983 is within the exception of the federal anti-injunction statute, which provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Acts of Congress".

However, under Section 1341 there are no exceptions of any kind where a plain, speedy and efficient remedy exists in the state courts.

The Appellant urges that there should be an exception in this case because an important congressional purpose should not be found for a penalty collateral to a taxing statute and asserts that this is a situation that Congress never contemplated.

Since the enactment of this statute in 1937 Congress, up to the present time, has not seen fit to provide an exception similar to that being urged by the Appellant.

The Appellant places great reliance on Harper v. Virginia Board of Elections, et al, 383 U.S. 663 (1966) which declared unconstitutional a Virginia poll tax statute as a pre-requisite for voting.

Section 1341 was not an issue in the Harper case, supra, and was not raised by the Defendant's as a grounds for dismissing the action or denying Federal jurisdiction.

In that case the Court, in considering the denial of voting privileges for failure to pay a fee, stated the proposition as follows:

> "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate." (Idem 666)

The Appellant in his Complaint (Appendix P7) contends that the Purchase and Use Tax in essence sets up two classes of motor vehicle operators: (1) those who owe a purchase and use tax; and (2) those who owe no such tax. He further concludes that the State of Vermont has no compelling interest to so classify its citizens.

Under this rational the state income tax, federal income tax and the social security tax could be declared unconstitutional because there are certain classes of people, i.e. poor people, who cannot afford to pay their taxes.

The Appellee knows of no cases that have sustained this position, nor are any called to the Courts attention by the Appellant in his Brief.

CONCLUSION

Therefore, the Appellee respectfully prays that this Court affirm the decision of the United States District Court for the District of Vermont.

Respectfully submitted,

RICHARD M. FINN
Assistant Attorney General
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
Counsel for James E. Malloy